APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3123/2920

LASOCIETE GENERALE IMMOBILIERE,
a French corporation; LSGI, INC.,
a Delaware corporation,
Appellees/Cross-appellants,

v.

MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY;
CITY OF MINNEAPOLIS,
Appellants/Cross-appellees.

Appeal from the United States District Court
for the District of Minnesota

Submitted: May 11, 1994

Filed: December 22, 1994

Before McMILLIAN, Circuit Judge, LIVELY,* Senior Circuit Judge, and WOLLMAN, Circuit Judge.

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* The Honorable Pierce Lively, Senior United States District Judge for the Sixth Circuit, sitting by designation.

McMILLIAN, Circuit Judge.

The Minneapolis Community Development Agency and the City of Minneapolis appeal from a final judgment entered in the United States District Court for the District of Minnesota upon a jury verdict finding them liable to La Societe Generale Immobiliere and LSGI, Inc., for the breach of a development contract and for injury to the developer's reputation in violation of the Due Process Clause of the Fourteenth Amendment. *La Societe Generale Immobiliere v. Minneapolis Community Dev. Agency*, 827 F. Supp. 1431 (D. Minn. 1993) (Order). For reversal, appellants argue that the district court erred in holding that: (1) the development contract at issue was ambiguous, (2) the City or the Mayor breached the contract, and (3) the claims brought under 42 U.S.C. § 1983 were cognizable as a matter of law. Appellants have also raised a number of issues with regard to damage calculation. La Societe Generale Immobiliere and LSGI, Inc., filed a cross-appeal on the issue of damages. For the reasons discussed below, we reverse the judgment of the district court.

I. BACKGROUND

In mid-1985, the Minneapolis Community Development Agency (MCDA)[1] and the City of Minneapolis (jointly, the "City") granted La Societe Generale Immobiliere (LSGI), a French real estate company, exclusive rights to negotiate the development of a new shopping center on Nicollet Mall in downtown Minneapolis. The project contemplated 900,000 square feet of retail shops and stores, a 400,000 square foot office building, and an underground parking garage. The development rights

[1] The MCDA is an agency whose responsibilities include assisting in economic development of the City of Minneapolis. The MCDA is governed by a thirteen-member Board of Commissioners comprised of the thirteen sitting City Council members. The MCDA also employs a professional staff.

extended over three and one-half blocks with the project's center on the City's north-south axis street, Nicollet Mall.

LSGI's plans envisioned a dome over the Nicollet Mall and the depression of the street into a tunnel (the so-called "dome and tunnel" design). This proposed design was immediately the subject of controversy, and a number of city officials and local business-persons expressed reservations about the concept. As part of this debate, on July 25, 1986, the City Council commissioned a Committee on the Future of the Nicollet Mall (Mall Committee). The overall design of the project was among the issues that the Mall Committee was to consider. John Cairns, an attorney for LSGI, served on the Mall Committee as an LSGI representative. On the same day the City Council created the Mall Committee, it also approved the sale of seventy-three million dollars of tax increment bonds for the project "subject to final design approval of the project's treatment of the Nicollet Mall by the City Council." Minneapolis Mayor Donald M. Fraser did not approve of this City Council action because, among other things, he had concerns about the project's design. However, the City Council's action became effective on July 31, 1986, because of the Mayor's inaction.

By September 1986, negotiators for MCDA and LSGI had largely completed the drafting of a Development Agreement as well as a lease and related documents. Attached to the Development Agreement were various exhibits, including a set of LSGI's preliminary plans for the dome and tunnel design. Before the Development Agreement could be executed, the MCDA Board and the Mayor were required to approve it. This approval would have authorized the Executive Director of the MCDA to sign the Development Agreement. On September 26, the Board gave its authorization, but on October 2, the Mayor vetoed this resolution and expressed his concern

that LSGI would market the proposed project using the dome and tunnel design concept. The Mayor specifically stated:

> If we sign this contract [the Development Agreement] we will be telling [LSGI] that we are prepared to go ahead with the basic design which [they have] proposed for the south end of the mall. It is true that we have final design approval over the treatment of the mall, but clearly LSGI will be marketing their project based on their current design.

The Mayor requested a six-week delay in the execution of the Development Agreement to enable the Mall Committee to finish its work. He also expressed the view that the Development Agreement should clearly recognize the City's prerogative to take into account the conclusions of the Mall Committee before making a final decision about the dome and tunnel design concept. Public debate over the dome and tunnel design concept continued throughout this period.

Before the Mall Committee's process had run its course, LSGI responded to the Mayor's concern by proposing the addition of language to the Development Agreement that clarified the City Council's continuing control over the project's design. This language was to be added to Section 2.02 of the Development Agreement. Section 2.02 was titled "MCDA Approval" and was included under Article II of the Development Agreement which was titled "Plan Approval." The original version of Section 2.02 stated in relevant part:

> It is understood by the Developer and the MCDA that no action of the Minneapolis City Council shall be necessary to approve the form or content of any of the proposed Project Plans or Specifications except for final design approval of the Project's treatment of the Nicollet Mall by the City Council.

The revision added the following language to the end of the above-quoted sentence:

> and further except that any such proposed Project Plans or Specifications shall be modified by the Developer to comply with any and all design guidelines or any and all other requirements related to the treatment of the Nicollet Mall adopted by the Minneapolis City Council prior to the final approval by the MCDA of the Proposed Project Plans and Specifications . . . .

The Mayor was satisfied with this additional specific recognition of the City's continuing control over the dome and tunnel design concept. He therefore invited the MCDA Board to override his veto and to authorize execution of the Development Agreement. The Development Agreement was executed and became effective on November 3, 1986. In the Development Agreement, LSGI promised to obtain the commitments of two major department stores, or "anchor" tenants. LSGI also promised to secure financing, present detailed final project plans, produce a number of other agreements, and resolve certain issues related to the project. During the year following execution of the Development Agreement, LSGI's design continued to create public controversy. In December 1986, the Mall Committee issued a report which recommended that transportation on the Nicollet Mall should remain at grade. The Mall Committee also recommended that the historical environmental feeling of openness of the Mall should be retained. Meanwhile, LSGI showed preliminary plans for the project, which included the dome and tunnel design concept, to numerous stores throughout the country.

On November 3, 1987, the anniversary of the execution date of the Development Agreement and the date set for closing, LSGI had delivered the commitment of only one anchor tenant, Nordstrom's. LSGI produced only a letter of possible interest from the Neiman-Marcus

chain. LSGI also failed to comply with a number of the other contractual obligations that were to be accomplished by November 3, 1987. LSGI, therefore, sought an extension of the Development Agreement in the form of a Post-Closing Agreement. The Post-Closing Agreement included a Post-Closing Schedule that gave LSGI a thirty-day extension to secure a second anchor tenant. LSGI, however, was unable to secure a second anchor.

Prior to the execution of the Post-Closing Agreement, the MCDA Board adopted a resolution referred to as the "Cramer Resolution," directing City officials working in consultation with the Nicollet Mall Implementation Staff (successor to the Mall Committee), the MCDA, and LSGI, to develop design guidelines for the project within thirty days that did not include a dome or a tunnel. The Cramer Resolution, which effectively rejected the dome and tunnel design concept, was debated and enacted at a public meeting of the MCDA Board of Commissioners on November 3, 1987. Two LSGI lawyers were present at the meeting. LSGI principal Bala Safyurtlu was also present. During the course of the meeting, the MCDA's attorney told the Board that the Development Agreement permitted the Cramer Resolution. No LSGI representative attempted to contradict this representation. Moreover, an LSGI attorney, John Cairns, made the following statement to the Board:

> On this question of design let me just tell you that we have said for months if not twelve months since we were here with you a year ago that we will reach a consensus on that design with you and you get the final shot at it. That's still in the contract, that's always been there . . . .

Neither the other LSGI attorney present nor LSGI principal Safyurtlu challenged this assertion. Five hours after the Cramer Resolution was enacted, LSGI and the City executed the Post-Closing Agreement which postponed many of LSGI's deadlines and contained language regard-

ing the City Council's right to final design approval which corresponded to similar language in the Development Agreement.

After the adoption of the Cramer Resolution, the *Minneapolis Star-Tribune* reported that Bruce Nordstrom, co-chair of Nordstrom's department stores, was surprised by the Cramer Resolution. On November 5, 1987, after reading Mr. Nordstrom's comments, Mayor Fraser wrote Nordstrom a letter explaining the planning and development process and assuring him of the City's continuing interest in Nordstrom's: "We very much want you to place a store in Downtown Minneapolis." On November 16, Mayor Fraser sent a similar letter to Robert Smith of Neiman-Marcus. The Mayor explained the City's position on the dome and tunnel design concept, but at the same time, he emphasized the City's desire to have Neiman-Marcus locate a store on the Nicollet Mall. During this time period, Mayor Fraser addressed a class of architecture students at the University of Minnesota. This lecture was secretly recorded, and its substance was reported in the *Skyway News,* a weekly local paper. As Mayor Fraser discussed the day-to-day difficulties of urban planning, he made reference to the Nicollet Mall project. According to the article, the Mayor specifically mentioned LSGI in the course of his discussion and later generally commented: "One of the things I've learned about developers is that they'll promise you anything . . . . Never believe a thing they say. Only when you get to the bottom line can you believe them."

On November 16, 1987, the "614 Company," which owned property in the area to be acquired by the City under the lease for the project, sued the MCDA in state district court alleging a temporary taking of its property, requested an order to compel the MCDA to resubmit the LSGI Development Agreement to the City Council for review and approval, and sought attorney's fees and other relief. Approximately two months later and seven weeks

after the extended deadline for LSGI to secure a second anchor, the MCDA notified LSGI that it was in default under the Post-Closing Agreement to the Development Agreement and under the Lease between the parties. MCDA stated that LSGI's failure to secure a second anchor was the basis for the default. This notice started a sixty-day period to cure the default that would be followed by a thirty-day period to avoid termination. On January 28, 1988, LSGI advised the City that the suit by the 614 Company constituted an unavoidable delay, as defined in the Development Agreement, until the litigation was resolved, and therefore, LSGI's rights under the Development Agreement could not be terminated.

On March 7, 1988, LSGI presented new basic design plans to the MCDA. On April 1, 1988, the City Council approved LSGI's plans and its design treatment of the Nicollet Mall as required by the Development Agreement. In addition, the City granted LSGI an extension until May 8, 1988, to produce evidence of a second major anchor tenant's commitment to lease space in the project and to provide evidence of project financing. On April 7, 1988, the Mayor vetoed the City Council's action of April 1, but on April 8, the veto was overridden by the City Council. By a letter dated that same day, the MCDA notified LSGI that unless LSGI cured its default by May 9, 1988, the MCDA would terminate LSGI's rights under the Development Agreement. By a letter dated May 11, 1988, the Executive Director of the MCDA informed LSGI that the period in which LSGI could cure its default under the Development Agreement had expired. However, the Director also informed LSGI that the MCDA was willing to forego termination of the Development Agreement if LSGI would agree to attempt the negotiation of an amended Development Agreement. These negotiations took place and lasted until May 1989, but they never resulted in the execution of an amended Development Agreement. On May 12, 1989, the MCDA Board, over LSGI's opposition, voted to terminate the

Development Agreement, and on June 1, 1989, the MCDA did in fact terminate the Development Agreement. This litigation followed shortly thereafter.

LSGI claimed that the City breached the Development Agreement and deprived LSGI of its constitutional rights under the Fourteenth Amendment. After a three-week trial, a jury found that City liable for breach of contract and loss of reputation, and judgment was entered on March 8, 1993 in the amount of $34,319,739. This amount reflected the jury's awards of $3,239,804 for reimbursement of out-of-pocket expenses, $22,500,000 for loss of projected future profits, and $8,579,935 for harm to LSGI's reputation. This amount was later reduced by the district court to $17,280,000 as a result of the City's post-trial motion. The City's motion for judgment as a matter of law and a new trial was denied. The City now appeals from the final judgment, and LSGI cross-appeals from the district court's post-trial denial of out-of-pocket expenses and the remittitur.

II. DISCUSSION

A. *Contract Ambiguity*

At trial, LSGI argued that the MCDA breached the Development Agreement by rejecting the dome and tunnel design concept in the Cramer Resolution. LSGI argued that the MCDA waited until it was too late to reject the dome and tunnel design concept, and therefore, the MCDA Board lacked the authority to eliminate the dome and tunnel design concept. The City argues that the district court erred in failing to grant judgment as a matter of law in favor of the City on LSGI's breach of contract claims. The City contends that under the Development Agreement it unambiguously retained the authority to exercise final design approval over the treatment of Nicollet Mall, specifically, the authority to reject the dome and tunnel design concept. Thus, the City concludes that the Cramer Resolution cannot therefore constitute a breach

of the agreement. In response, LSGI argues that it had provided proposed Project Plans and Specifications more than sixty days before the Closing Date, as required by Section 2.02 of the Development Agreement, and that the MCDA by inaction "approved" those proposed Project Plans and Specifications before the adoption of the Cramer Resolution.[2] LSGI contends this resolution was a breach

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[2] Section 2.02 of the Development Agreement provided in relevant part:

> No later than sixty (60) days prior to the Closing Date, the Developer shall submit two sets of proposed Project Plans and Specifications for the Project to the MCDA for review and approval. . . .
>
> The MCDA shall review the proposed Plans and Specifications so submitted to it by the Developer for general conformance to the Preliminary Plans within fifteen (15) business days of the date on which such materials were submitted by the Developer. If the MCDA reasonably determines the proposed Project Plans and Specifications submitted are in general conformance with the Preliminary Plans and this agreement, the MCDA shall promptly cause one copy of them to be executed by its appropriate official indicating such approval and to be returned to the Developer within such period. Those proposed Plans and Specifications so approved shall become a part of the Project Plans and Specifications. If the MCDA reasonably determines that the materials submitted are not in general conformance with the Preliminary Plans and this Agreement, and thus declines to approve them, it shall provide to the Developer within such fifteen (15) business day period a signed letter indicating with reasonable specificity the areas in which the MCDA believes there is not conformance and shall also indicate such adjustments the MCDA believes are necessary to secure its approval. The Developer may then submit such revisions to the proposed Project Plans and Specifications as it deems necessary to meet the objections of the MCDA so as to bring the proposed Project Plan [sic] and Specifications into conformance with the Preliminary Plans and this Agreement (in which case the MCDA must respond within the time frame and in the manner indicated above). If the MCDA fails to respond within the fifteen (15) business day period, the proposed Project Plans and Specifications so submitted shall be deemed approved and the MCDA

of the Development Agreement because once the proposed Project Plans and Specifications were "approved" under Section 2.02 of the Development Agreement, the MCDA had no power to reject the dome and tunnel design concept. The district court concluded that Section 2.02 was ambiguous and therefore allowed the jury to interpret the Development Agreement.

We review the district court's determination of Minnesota law de novo. *Medtronic v. ConvaCare,* 17 F.3d 252, 255 (8th Cir. 1994). Under Minnesota law, the construction and effect of a contract presents a question of law, unless an ambiguity exists. *Trondson v. Janikula,* 458 N.W.2d 679, 681 (Minn. 1990). The initial question of whether a contract is ambiguous is a question of law to be decided by the trial court. *Lamb Plumbing & Heating Co. v. Kraus-Anderson,* 296 N.W.2d 859, 862 (Minn. 1980). "Ambiguity exists when the language of a written document, by itself, is reasonably susceptible to more than one meaning." *Trondson,* 458 N.W.2d at 681. However, when the intention of the parties to a contract is ascertainable from the writing, construction is for the court. *Chergosky v. Crosstown Bell,* 463 N.W.2d 522, 525 (Minn. 1990). When the court construes a contract, it must construe the contract as a whole and attempt to harmonize all clauses of the contract. *Id.*

In our review of the district court's denial of the City's motion for judgment as a matter of law, we must first determine whether the district court was correct in concluding that the Development Agreement was ambiguous. The district court reiterated its conclusion as to ambiguity when ruling on the City's post-trial motion:

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shall, upon request, execute a certificate of approval. Once proposed Project Plans and Specifications are approved as set forth above, and any other conditions required by this Agreement are fulfilled, the Developer may commence the construction to which the items relate.

> The court found, and maintains, that it is not clear from the plain language what the parties intended in their use of the term "final design treatment." It is, perhaps, conceivable that this provision granted the defendants unfettered discretion to reject LSGI's design at any time, as the defendants contend. The Court finds, however, that it is at least as likely that the provision simply provided for final touch-up and refinement of minor issues. Because of this patent ambiguity, the interpretation of this provision was submitted to the jury.

827 F. Supp. at 1435. We note that the district court mistakenly seized upon the term "final design treatment" in order to demonstrate what it deemed to be a patent ambiguity. However, the term "final design treatment" does not appear anywhere in Section 2.02 of the Development Agreement. The district court order misquoted Section 2.02 of the Development Agreement:

> It is understood by the Developer and the MCDA that no action of the Minneapolis City Council shall be necessary to approve the form or content of any of the proposed Project Plans or Specifications except for *final design treatment* of the Nicollet Mall by the City Council . . . .

827 F. Supp. at 1434 (emphasis added). The first exception of Section 2.02 should read: "except for final design *approval of the Project's* treatment of the Nicollet Mall by the City Council."[3] Appellants' Appendix at 216 (emphasis added).

This misquotation is important because the district court erroneously relied on the phrase "final design treatment" in finding that the Development Agreement was

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[3] This correct version appears on page #11 of Trial Exhibit 2. The district court order refers to Trial Exhibit 3. We assume that this was merely a typographical error because Trial Exhibit 3 was the Post-Closing Agreement, which did not have eleven pages.

ambiguous. While the district court's fear of equivocation in any attempt to interpret "final design treatment" may have been justified, the phrase "final design *approval* of the Project's treatment of the Nicollet Mall" does not warrant such concern. It is clear from the Development Agreement that the City Council retained the right to have the final shot at any proposed design. The Development Agreement further clearly provided that the City Council had to act affirmatively to give its "final design approval." The evidence was undisputed at trial that the City Council had not yet taken such action. Therefore, at the time the MCDA Board of Commissioners, the thirteen sitting council members, passed the Cramer Resolution calling for the design to retain the Mall's historic feeling of openness and to leave the street traffic at grade, the City Council unmistakably held the power to approve or disapprove of the Project's design treatment of the Nicollet Mall.

The district court's concern over the word "treatment" was also misplaced. "Because a word has more than one meaning does not mean it is ambiguous. The sense of a word depends on how it is being used; only if more than one meaning applies within that context does ambiguity arise." *Board of Regents v. Royal Ins. Co. of America*, 517 N.W.2d 888, 891 (Minn. 1994). There are no conflicting uses of the word "treatment" in the Development Agreement. Minnesota law commands that we give contract terms their plain and ordinary meaning. *See Litton Microwave Cooking Prod. v. Leviton Mfg. Co.*, 15 F.3d 790, 796 (8th Cir. 1993) (applying Minnesota law). Because the Development Agreement provided no special definition of the term "treatment," we give the term its ordinary meaning, and therefore, we conclude that the phrase "final design approval of the Project's treatment of the Nicollet Mall" must include approval of the dome and tunnel design concept. Had the parties merely intended for the City Council to have the authority to approve only "final touch-up and refinement of minor is-

sues," such intention would have been made explicit in the Development Agreement. Nothing in the Development Agreement indicates that we should read the phrase to be, in any way, a limitation on the scope of the City Council's authority to reject completely a particular design concept. The language of the Development Agreement clearly provided the "unfettered discretion" which the district court considered a mere possibility under its "final design treatment" analysis. We hold, therefore, that the Development Agreement was not ambiguous.

The authority of the City Council to give or to withhold its final design approval hung like the Sword of Damocles over the heads of LSGI. As Justice Thurgood Marshall noted in another context, the value of the Damoclean Sword is "that it hangs—not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). On November 3, 1987, the City Council's sword, its power to approve or reject the final design concept, was still in place. LSGI may well have been unwise to grant the City Council such authority, but, where, as here, two sophisticated parties negotiated a commercial contract which was executed in the absence of fraud, duress, or any other form of unconscionability, we will not rewrite the contract in order to save a contracting party from its own poor decisions. *See In re Stevenson Assoc.*, 777 F.2d 415, 421 (8th Cir. 1985) (applying Minnesota law); *Telex Corp. v. Data Prod. Corp.*, 135 N.W.2d 681, 687 (Minn. 1965) ("It is not ordinarily the function of courts to rewrite, modify, or set aside contract provisions fully considered and agreed upon between the parties."); *see also Morello v. Federal Barge Lines*, 746 F.2d 1347, 1351 (8th Cir. 1984) ("Courts of law do not sit in order to save parties from their contractual mistakes.").

LSGI argues that under the second exception of Section 2.02 of the Development Agreement, only the City Council and not the MCDA Board had the authority to

adopt the Cramer Resolution. That exception provided for LSGI's compliance with "any and all design guidelines or any and all other requirements related to the treatment of Nicollet Mall adopted by the Minneapolis City Council prior to final approval by the MCDA of the proposed Project Plans and Specifications." LSGI attempts, through a highly technical reading, to create a distinction between the MCDA Board and the City Council to support its theory of breach, i.e. that the MCDA did not have authority on November 3, 1987, to pass the Cramer Resolution.[4] Applying the close reading urged by LSGI, we conclude that the second exception made clear the City Council's ability to exercise control over and inject its views into the project design development process. The language of this second exception cannot be read to limit the authority of the City Council provided in the first exception, to approve or reject the final design concept. Because the City Council clearly retained its plenary power to grant or deny final design approval on November 3, 1987, the action of the council members, sitting as the MCDA Board, cannot, as a matter of law, constitute a breach of the Development Agreement.

B. *The Mayor's Statements*

LSGI also argued that certain statements made by Mayor Fraser in November 1987 constituted a breach of the Development Agreement because they hindered LSGI's ability to secure a second anchor tenant. These

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[4] While addressing a different issue, the district court had occasion to make the following statement with regard to the relationship between the City Council and the MCDA: "Throughout this litigation, the parties have agreed that it was unnecessary to distinguish between the City of Minneapolis and the MCDA. The members of the MCDA board and the members of the Minneapolis City Council are the same individuals. These two public bodies functioned in complete congruity with respect to the LSGI contract." 827 F. Supp. at 1437.

statements consisted of the letter to Robert Smith of Neiman-Marcus, the letter to Bruce Nordstrom of Nordstrom's department stores, and the remarks about the trustworthiness of developers made in an address to a group of architecture students at the University of Minnesota. The City argues that LSGI's claim of breach of the contract predicated on these statements must fail as a matter of law because LSGI introduced no evidence to establish a causal link between any of these statements and the inability of LSGI to secure a second anchor tenant. Further, the City claims that the Mayor's remarks to the architecture class regarded a matter of public concern and were therefore privileged. LSGI responds to this argument of privilege by claiming that any immunity exists to protect public officials from tort actions and not breach of contract actions. LSGI also contends that if the Mayor did have immunity in this case, it would be personal only and would not protect the City from liability.

Minnesota law provides that "contract performance is excused when it is hindered or rendered impossible by the other party." *Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984). Further, "a breach of contract occurs under those circumstances." *Id.* Minnesota law also provides that there must be a causal link between the alleged breach and the party's claimed damages. *See Nguyen v. Control Data Corp.*, 401 N.W.2d 101, 105-06 (Minn. Ct. App. 1987). Causation is a question of fact, and the jury's conclusion will not be upset "unless the court finds it to be manifestly contrary to the weight of the evidence." *Lamke v. Louden*, 269 N.W.2d 53, 56 (Minn. 1978).

We hold the record before us does not support the jury's finding of causation. LSGI simply produced no evidence that the Mayor's letters had any adverse effect on its attempt to secure a second anchor tenant. With regard to the letter to Neiman-Marcus, its representative testified that the Mayor's letter had no effect on his com-

pany's decision to back away from its initial statement of interest in the project. However, even if LSGI had produced such evidence, the evidence would have to demonstrate that the letters were in some way inconsistent with any action which the City could properly take under the terms of the Development Agreement. Minnesota law does not provide for a breach of contract action for any and all hindrances of one party's performance by the action of another. Rather, "every contract contains an implied condition that each party will not *unjustifiably* hinder the other from performing." *Zobel & Dahl Constr.*, 356 N.W.2d at 45 (emphasis added). The City's rejection of the dome and tunnel design concept may have made it more difficult for LSGI to fulfill its obligation to secure two anchor tenants, but where the City's action was authorized by the Development Agreement, such action was not an unjustifiable hindrance and thus cannot constitute the basis for a claim of breach of contract. Therefore, the Mayor's letters, which did no more than explain the City's action, cannot, as a matter of law, breach the Development Agreement.

With regard to the Mayor's remarks to the architecture class, we will assume for purposes of analysis only that they were not privileged. Arguing against the application of any sort of privilege, LSGI itself noted that this claim is not a tort claim, but a breach of contract claim. LSGI had to come forward with some evidence to show that the Mayor's remarks did in fact unjustifiably hinder its ability to secure a second anchor tenant. LSGI, however, presented no evidence that the *Skyway News* report of the Mayor's remarks in any way adversely affected LSGI's ability to secure a second anchor tenant. LSGI would have us consider the mere fact that it did not obtain a second anchor tenant to be sufficient proof of causation. Without any evidence that these statements adversely influenced the decision-making process of a prospective anchor tenant or otherwise unjustifiably hindered LSGI's performance, LSGI's claim that the Mayor's remarks

about the trustworthiness of developers effectively breached the Development Agreement is also insufficient as a matter of law.

C. *Unavoidable Delay*

There is some dispute between the parties as to whether a theory of unavoidable delay based on the 614 Company litigation was submitted to the jury as a separate ground upon which it could find the City liable for breach of contract. LSGI contends that it did not affirmatively argue unavoidable delay to the jury as a separate ground for finding a breach, but at the same time, it maintains that termination during a period of unavoidable delay would be improper. Further, it has argued that the 614 Company lawsuit did represent an unavoidable delay under the terms of the Development Agreement. Because the verdict form simply asked whether the City breached the Development Agreement and because the district court instructed the jury that unavoidable delay, not caused by either party, would excuse nonperformance, we will assume for purposes of analysis that a theory of unavoidable delay was presented to the jury as an independent theory of the City's breach of the contract. This approach is consistent with our duty to analyze the evidence in the light most favorable to the prevailing party when reviewing the denial of judgment as a matter of law (JNOV). *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992).

Under the Development Agreement, a third party lawsuit constituted an "unavoidable delay" and postponed the timing for the fulfillment of obligations made subject to any unavoidable delay. Therefore, LSGI's argument is that the City's termination of the Development Agreement was wrongful because LSGI's failure to obtain a second anchor tenant could not serve as a proper basis for the City's action in light of the 614 Company lawsuit. The City asserted in its brief that the evidence was uncontradicted that the 614 Company lawsuit was not

caused by the MCDA and that the 614 Company litigation was still pending. Therefore, the third party action was an "Unavoidable Delay" as that term is defined by the Development Agreement. Section 15.03 of the Development Agreement provided that the City's right to terminate the contract was "subject to Unavoidable Delays." The language of this section requires us to consider the provisions of Section 17.08 entitled "Enforced Delay in Performance Beyond Control of Party." This section allowed an extension for performance of any obligation made subject to unavoidable delays "provided, that the party seeking the benefit of the provision of this section shall, within thirty (30) days after the beginning of any such Unavoidable Delay, have first notified the other party thereof, and requested an extension for the period of such delay." In considering the parties' motions for summary judgment, the district court noted that the 614 Company lawsuit was commenced on November 18, 1987, and that LSGI's first written assertion of unavoidable delay did not occur until January 28, 1988. Further, the district court noted that LSGI did not dispute the fact that its notice was tardy. The district court ruled, however, that the notice provision should not be enforced under Minnesota law unless the party who was to receive notice could prove prejudice. *La Societe Generale Immobiliere v. The Minneapolis Community Dev. Agency*, No. 3-89-372, slip op. at 12 (D. Minn. July 19, 1990) (Summary Judgment Order). Finding that prejudice to the MCDA was unlikely here, the district court denied summary judgment on this ground.

To support its understanding of Minnesota law on the enforcement of notice provisions, the district court relied on two cases which involved circumstances unique to the insurance industry. *See St. Paul Fire & Marine Ins. Co. v. Wabash Fire & Casualty Ins. Co.*, 264 F. Supp. 637 (D. Minn. 1967); *Reliance Ins. Co. v. St. Paul Ins. Co.*, 239 N.W.2d 922 (Minn. 1976). The district court improperly relied on these insurance cases in order to disregard the clear language of the commercial development

contract at issue in the present case. In *Reliance*, for example, the Supreme Court of Minnesota was called upon to decide whether an attorney being sued for malpractice lost the benefit of her liability insurance policy by failing to notify her insurer in the timely manner required by the policy. Concluding that the insured's late notification did not bar coverage, the court stated:

> One of the prime reasons for this type of liability insurance is to pay damages caused by certain acts or omissions of the insured. . . . The very nature of these peculiarities insured against indicates that this type of insurance is not only a contract between the insurer and the insured but also a contract for the benefit of the public. Therefore, we hold that despite delay in notification the insurers are required to afford coverage under their contracts in the absence of actual prejudice, should liability be otherwise shown according to the terms of the policies.

239 N.W.2d at 924. The limited nature of this holding does not fairly support the district court's expansive conclusion that notice provisions in all types of contracts will not be enforced in the absence of actual prejudice. But for the district court's summary judgment order in this case, we have found no authority for the broad application of *Reliance* to contracts in general.[5] When interpreting commercial contracts like the one before us, we will give notice provisions their plain and ordinary meaning. Therefore, LSGI could not seek the benefit of the extension for performance provided under Section 17.08 of the Development Agreement because, by its own admission, it did not timely notify the City of its desire

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[5] In *Naylor v. The Minnesota Daily*, 342 N.W.2d 632, 635 (Minn. 1984), the court cited to *Reliance* to support its conclusion that the state could assert failure to receive notice of claim as a defense under the state's Tort Claims Act if it could establish prejudice. It also noted that this result was "consistent with the court's construction of notice provisions in *insurance* contracts." *Id.* (emphasis added).

to take advantage of the unavoidable delay extension. Consequently, it was not improper for the City to base its decision to terminate the Development Agreement on LSGI's inability to secure a second anchor tenant. The City was therefore entitled to judgment as a matter of law on the unavoidable delay theory.

D. *Section 1983 claims*

The City also argues the district court erred in denying its motion for judgment as a matter of law on LSGI's constitutional claims. LSGI claimed that it was deprived of both a property interest and a liberty interest, and further asserted that it was denied both procedural and substantive due process. The district court granted the City's motion for judgment as a matter of law on LSGI's property claim, finding that LSGI's breach of contract claim provided an adequate post-deprivation state law remedy. *See Zar v. South Dakota Bd. of Examiners*, 976 F.2d 459, 465 (8th Cir. 1992). However, the district court found sufficient evidence to submit LSGI's liberty claims to the jury. The district court concluded that the Supreme Court's rejection of Section 1983 claims based on injury to reputation alone was not a bar here because the harm to LSGI's reputation clearly occurred in connection with "the deprivation of an existing contractual right." 827 F. Supp. at 1437. Accordingly, LSGI contends in this appeal that it proved and the jury found that Mayor Fraser, acting on behalf of the City, deprived LSGI of a liberty interest, without due process of law, by substantially injuring its reputation in the context of the City's breach of contract.

Because we have concluded that the City did not deprive LSGI of a contractual right, the reasoning of the district court can no longer support the submission of the LSGI's liberty claims to the jury. Although it is our view that LSGI's due process claims were held together by a tenuous chain of legal reasoning fraught with weak links, we need not address all of the weaknesses because

our conclusion that the City did not breach the contract is sufficient to dispose of the Section 1983 claims as well. LSGI properly concedes that the Supreme Court has made clear that injury to reputation alone cannot support a claim for deprivation of a liberty interest without an accompanying alteration of legal status. *See Paul v. Davis*, 424 U.S. 693, 708-09 (1976). LSGI, however, argues that the Mayor's letters and statements simultaneously breached the contract and harmed its reputation. This argument must fail because we have concluded that the Mayor's actions did not, as a matter of law, breach the Development Agreement. The Mayor's letters and remarks did not effect a change in LSGI's legal status. The lawful termination of the Development Agreement and the Mayor's allegedly disparaging letters and remarks, made eighteen months earlier, cannot be joined together to establish a violation of the Due Process Clause. Because LSGI is now left with an ordinary claim of injury to reputation, its Section 1983 claims fail as a matter of law. *Id*; *Clark v. Solem*, 628 F.2d 1120, 1121 (8th Cir. 1980). Thus, we need not consider whether the Mayor's letters and remarks were defamatory; further, we need not consider any issues surrounding the City's liability for the Mayor's letters and remarks or any issues regarding immunity because, even assuming we resolved these issues in favor of LSGI, its Section 1983 claims would still fail as a matter of law.

III. CONCLUSION

We hold the City was entitled to judgment as a matter of law on LSGI's breach of contract and civil rights claims. In light of our decision on liability, we need not address the issues raised on appeal and cross-appeal regarding damages. For the reasons discussed above, the judgment of the district court is reversed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-3123/2920MNMI

LASOCIETE GENERAL IMMOBILIERE, *etc.*,
Appellees,

vs.

MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY, *et al.*,
Appellants.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Judge Bowman and Judge Magill would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

Judge Loken and Judge Murphy took no part in the consideration or decision of this case.

February 17, 1995

Order Entered at the Discretion of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX C

[Filed July 21, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

4-92-CV-53

LA SOCIETE GENERALE IMMOBILIERE, *et al.*

v.

THE MINNEAPOLIS COMMUNITY
DEVELOPMENT AGENCY, *et al.*

ORDER

A jury trial in this cause began on February 1, 1993. On February 22, 1993, the jury returned its verdict in favor of plaintiff, La Societe Generale Immobiliere (LSGI), and against the named defendants, the Minneapolis Community Development Agency (MCDA) and the City of Minneapolis. The jury awarded $8,579,935 for harm to LSGI's reputation, $22,500,000 in lost profits damages, and $3,239,804 in out-of-pocket expenses. The jury returned a verdict in favor of the defendants on the plaintiff's tortious interference claims. Consistent with the jury's verdict, judgment was entered by the Court on March 8, 1993.

Both plaintiff and defendants have timely briefed and argued post-trial motions. The defendants move for judgment as a matter of law, pursuant to Rule 50(b), Federal Rules of Civil Procedure (Fed.R.Civ.P.), or for a new trial, pursuant to Rule 59(a), Fed.R.Civ.P. In the

alternative, the defendants seek remittitur. The defendants also move for cancellation of the Notice of Lis Pendens which the plaintiff filed on the property which underlies the "footprint" of the proposed development.

The plaintiff seeks an award of attorneys' fees under 42 U.S.C. §§ 1983 and 1988. In this regard, the plaintiff, on March 23, 1993, filed a Notice of Intent to Claim an Award of Attorneys' Fees, pursuant to the local rules. D.Minn.L.R. 54.3(b)(2).

Defendants' Post-trial Motions

In their brief, the defendants raise eleven arguments in support of their motion for judgment as a matter of law.[1] Alternatively, the defendants raise 25 alleged errors of law which they claim require a new trial. Nine of these claimed errors relate to the jury instructions. To the extent that the defendants properly objected to the instructions, these issues are preserved for appeal. Seven asserted errors relate to the Court's evidentiary rulings, and the conduct of the Court and plaintiff's counsel during this ten-day trial. The Court maintains its previous rulings on these issues.

The defendants' contention that the special verdict form was ambiguous is addressed, *infra*, at footnote 3. The final eight alleged errors relate to the issues of lost profits, out-of-pocket expenses, and the award of damages under § 1983 for harm to LSGI's reputation. These issues are

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[1] Seven of these arguments relate to the insufficiency of the evidence to support the jury's finding of liability. The defendants also contend that LSGI lacked standing to bring its breach of contract claim under Minnesota Statutes, §§ 303.13, 303.20, and 290.371. The defendants also "reassert" all other issues raised in their previous motions for summary judgment and directed verdict. The Court addressed these issues on the record at trial, and maintains its previous rulings. The defendants' assertion that the plaintiff's § 1983 claim was insufficient as a matter of law and was barred under the doctrine of qualified immunity is addressed, *infra*.

addressed, *infra*. The Court turns to the defendants' primary contentions.

First, the defendants claim that the Court erred in ruling that the development agreement was ambiguous. Second, the defendants assert that the Court erred in submitting LSGI's lost profits claim to the jury since—in defendants' view—lost profits were "utterly speculative." Third, defendants contend that the Court erred in submitting LSGI's § 1983 due process claims to the jury. Fourth, the defendants contend that this Court erroneously entered judgment against the City of Minneapolis because the jury's verdict was entered only against the MCDA. Finally, the defendants contend that the plaintiff is not entitled to an award of out-of-pocket expenses in addition to the lost profits damages.

a. *Contract Ambiguity*

The defendants contend that this Court erred in ruling that the development agreement was ambiguous. Defendants contend that the Minneapolis City Council retained unfettered discretion to approve the final design treatment of the Nicollet Mall, which included the right to reject the "dome and tunnel" concept at any time. The contested language provides, in pertinent part:

> It is understood by the Developer and the MCDA that no action of the Minneapolis City Council shall be necessary to approve the form or content of any of the proposed Project Plans or Specifications except for final design treatment of the Nicollet Mall by the City Council and further except that any such proposed Project Plans or Specifications shall be modified by Developer to comply with any and all design guidelines or any and all other requirements related to the treatment of Nicollet Mall adopted by the Minneapolis City Council prior to the final approval by the MCDA of the Proposed Project Plans and Specifications . . . .

(Tr. Ex. 3 at p.11). The defendants conclude that this provision entitled them to reject or redesign the "dome and tunnel" concept at any time until final approval by the MCDA. In their view, they are entitled to judgment as a matter of law on the plaintiff's breach of contract claim.

The construction and effect of a contract provision is a question of law for the court unless an ambiguity exists. *Hydra-Mac v. Onan Corp.*, 450 N.W.2d 913, 916-17 (Minn. 1990). An "[a]mbiguity exists when the language of a written document, by itself, is reasonably susceptible to more than one meaning." *Trondson v. Janikula*, 458 N.W.2d 679, 681 (Minn. 1990).

The Court maintains its previous ruling that the language cited above is ambiguous. It is not at all clear to the Court that, on the 365th day of a one-year contract, the defendants could simply reject an approved design plan. Certainly a clause of this type could reserve finish or treatment details. But the overall design plan had been approved and a concept drawing was part of the approved documents. The defendants knew that the dome and tunnel plan, with the road surface of Tenth Street and the Nicollet Mall within its footprint, was an integral part of the presentation being made to prospective anchor tenants. This design plan was appended to the development contract.

The Court found, and maintains, that it is not clear from the plain language what the parties intended in their use of the term "final design treatment." It is, perhaps, conceivable that this provision granted the defendants unfettered discretion to reject LSGI's design at any time, as the defendants contend. The Court finds, however, that it is at least as likely that the provision simply provided for final touch-up and refinement of minor issues. Because of this patent ambiguity, the interpretation of this provision was submitted to the jury.

b. *Lost Profits Damages*

The defendants contend that, because LSGI's lost profits claim is based upon a business venture which never came into existence, any award of $22,500,000 is inherently speculative. The defendants argue that the lost profits analysis provided by LSGI's expert, Harold W. Perry, was based upon conjectural estimates and assumptions. The plaintiff responds that the lost profits were demonstrated with reasonable certainty through Perry's detailed feasibility analysis.

Minnesota law provides that lost profits are recoverable so long as they are not speculative, remote, or conjectural. *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1510 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1048 (1993); *Cashman v. Allied Products Corp.*, 761 F.2d 1250, 1253 (8th Cir. 1985). "Lost profits may be recovered if they are a natural and proximate result of the breach, and are proved with reasonable, although not absolute, certainty." *Olson v. Rugloski*, 277 N.W.2d 385, 388 (Minn. 1979). "Uncertainty as to the *fact* of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the *amount* is not." *Cardinal Consulting*, 297 N.W.2d at 267 (*citing El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 261 N.W.2d 358, 363-64 (Neb. 1978) (emphasis in *El Fredo*)). Furthermore, there is "no *per se* rule that only an 'established business' can recover damages for loss of prospective profits." *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977). The method of proving such damages "*depends upon the circumstances of the particular case.*" *Cardinal Consulting*, 297 N.W.2d at 267 (emphasis in original).

The defendants previously challenged LSGI's lost profits claim in a motion to dismiss filed March 11, 1991. The motion was heard by the Honorable Edward J. Devitt, United States District Judge, District of Minnesota. Judge

Devitt reviewed Minnesota law on the issue of lost profits, and scrutinized the expert testimony presented by both the plaintiff and the defendants. After his review, Judge Devitt ruled against the defendants, concluding that "the evidence suggests that a jury could determine to a reasonable certainty both the fact and amount of lost profits damages." (Memorandum Order, April 4, 1991, Docket #77 at p.11.)

At trial, LSGI provided competent and credible expert testimony in the form of a detailed feasibility analysis to support its lost profits claim. The estimates included both a site and market analysis. On the basis of Perry's testimony, the plaintiff sought $45.6 million in lost profits damages. The defendants cross-examined Perry, and offered five damages experts in rebuttal. The Court found, and maintains its ruling, that there was sufficient evidence upon which a jury could fairly determine both the existence and extent of LSGI's lost profits. The jury was properly instructed that it could award lost profits "based only upon a reasonable certainty and not on speculation or conjecture." (Instr. No. 47.)

The jury determined that the plaintiff proved, with reasonable certainty, lost profits in the amount of $22.5 million. The size of this figure—less than 50% of plaintiff's expert's appraisal—was supported by the evidence. The Court finds no grounds to disturb the jury's finding.

c. *LSGI's § 1983 Claims*

The defendants contend that this case, at its core, is a breach of contract case, and that the Court erred as a matter of law in submitting LSGI's § 1983 constitutional claims to the jury. The defendants contend that LSGI failed to show that the MCDA deprived the developer of a constitutionally protected property or liberty interest without due process.[2] The defendants further contend

[2] The defendants raise the argument that they are entitled to qualified immunity from liability. Qualified immunity "is a ques-

that LSGI had an adequate state law remedy, and that the record was devoid of evidence to support the $8,579,935 award for damage to LSGI's reputation.[3]

LSGI claimed that it was deprived of both a property and liberty interest, and further asserted that it was denied both procedural and substantive due process. This Court granted defendants' motion for judgment as a matter of law on LSGI's property claim, finding that LSGI's breach of contract claim provided an adequate post-deprivation state law remedy. *See Parratt v. Taylor*, 451 U.S. 527 (1981); *Zar v. South Dakota Bd. of Examiners of Psychologists*, 976 F.2d 459, 465 (8th Cir. 1992); *Williams-El v. Johnson*, 872 F.2d 224, 228 (8th Cir. 1989), *cert. denied*, 493 U.S. 871 (1989); *Reese v. Kennedy*, 865 F.2d 186, 187 (8th Cir. 1989).[4]

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tion of law that 'ordinarily should be decided by the court long before trial.'" *Swenson v. Trickery*, No. 92-2451, slip op. at 3, 1993 WL 188270 at *1 (8th Cir. June 7, 1993) (*quoting Hunter v. Bryant*, 112 S.Ct. 534, 537 (1991). *See also Arnott v. Mataya*, No. 92-2566, slip op. at 5, 1993 WL 177675 at *2 (8th Cir. May 28, 1993) ("immunity should be determined at the earliest possible stage in litigation"). The defendants neither pleaded nor argued qualified immunity prior to trial. However, in light of *Krueger v. Fuhr*, 991 F.2d at 438 n.2, the Court notes that qualified immunity has not been extended to municipalities. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980); *Murray v. City of Sioux Falls*, 867 F.2d 472, 474 n.2 (8th Cir. 1989).

[3] The defendants argue that question 9 of the verdict is ambiguous because it is unclear whether the award was based upon LSGI's property or liberty claim. This argument is hollow because the parties stipulated to the verdict form. The Court held numerous charge conferences to address the verdict form, during which the Court itself raised the very issue of which the defendants now complain. Because the defendants failed to object to the verdict form at the charge conferences or at the time of the verdict, this issue has been waived. *Arnott v. American Oil Co.*, 609 F.2d 873, 889 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980); Fed.R.Civ.P. 51. This is invited error, if error it is.

[4] Despite this Court's ruling, the Court submitted the property claim to the jury to avoid a possible retrial on this issue.

The defendants contend that the Court should have similarly dismissed LSGI's procedural and substantive due process liberty claims. The Court maintains its previous determination that *Parratt* does not bar LSGI's liberty claims. *Parratt* does not apply to questions of substantive due process. *Williams-El*, 872 F.2d at 229. As to the procedural due process liberty claim, state tort law does not provide the plaintiff with a constitutionally adequate post-deprivation remedy in light of the defendants' potential immunity defenses. *See Johnson v. Dirkswager*, 315 N.W.2d 215 (Minn. 1982).

The Court found sufficient evidence to submit LSGI's liberty claims to the jury. "To establish a liberty interest under the Fourteenth Amendment for injury to reputation a party must show not only that he was stigmatized but also that he was stigmatized in connection with a denial of a right or status previously held under state law." *Mangan v. Cullen*, 870 F.2d 1396, 1399 (8th Cir. 1989) (*citing Paul v. Davis*, 424 U.S. 693 (1976)).[5]

This Court found that the Mayor's public statements and letters in the days following November 4, 1987, constituted sufficiently egregious governmental conduct to present the substantive due process claim to the jury. Through the testimony of its president, LSGI presented compelling evidence that the Mayor's statements and letters stigmatized LSGI's reputation in the extremely small

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[5] The standard which the plaintiff must meet to prove a violation of its liberty interests varies with the factual context of the case. As examples, the standard applicable to employment cases is delineated in *Shands v. City of Kennett*, Nos. 92-1978 and 92-1790, slip op. at 16-17, 1993 WL 168236 at *9 (8th Cir. May 21, 1993). *See also Codd v. Vegler*, 429 U.S. 624, 626-628 (1977). The standard in cases involving the denial of a building permit is discussed in *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *Lemke v. Cass County, Neb.*, 846 F.2d 469 (8th Cir. 1987) (en banc); *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990); and *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992).

community of international real estate developers and major "anchor" retailers upon which LSGI's success depended. This harm to LSGI's reputation clearly occurred "in connection with" the deprivation of an existing contractual right. *Mangan*, 870 F.2d at 1399. The Court found LSGI's liberty claims legally sufficient, and the jury found, as a matter of fact, that the defendants' conduct amounted to a constitutional deprivation of due process. The Court declines to disturb the jury's finding.

d. *Judgment Against the City of Minneapolis*

The defendants contend that this Court erroneously entered judgment against the City of Minneapolis because the verdict form only named the Minneapolis Community Development Agency (MCDA). This argument is a sophistry which ill-befits the city. Throughout this litigation, the parties have agreed that it was unnecessary to distinguish between the City of Minneapolis and the MCDA. The members of the MCDA board and the members of the Minneapolis City Council are the same individuals. These two public bodies functioned in complete congruity with respect to the LSGI contract. The defendants factually and tactically tried this case as if they comprised one entity. Any argument to the contrary has been waived.

e. *Out-of-Pocket Expenses Damages*

The defendants contend that the plaintiff is not entitled to an award of out-of-pocket expenses beyond the award of lost profits. The plaintiff argues that because it did not receive the full $45.6 million in lost profits which it sought, it is not precluded from recovering out-of-pocket expenses. The Court rejects the plaintiff's argument.

The jury was properly instructed that, under Minnesota law, out-of-pocket expenses are considered in the calculation of lost profits damages and are not awarded in addition to a lost profits recovery. *See Cardinal Con-*

sulting, 297 N.W.2d at 269; *Inland Products Corp. v. Donovan, Inc.*, 82 N.W.2d 691, 696 (Minn. 1957).

The plaintiff's own calculations acknowledge that expenses are not recoverable in light of the lost profits award. The $45.6 million demand represented the net present value of the development project. To arrive at this figure, Perry calculated the expected profit of the project by subtracting the expected costs from the expected profits (or losses) over a ten-year period.

This argument is also rejected for much the same reason as the Court rejects any dichotomy between the City of Minneapolis and the MCDA. The plaintiff consistently maintained to this Court that, if it received a recovery for lost profits, it would have no claim for out-of-pocket expenses. The verdict form and the jury instructions were shaped by this position. The plaintiff will not be heard to assert—after the verdict—that, if it did not get one hundred cents on each dollar of its claim, it could recover out-of-pocket expenses. The jury's award of out-of-pocket expenses is vacated, and the judgment shall be reduced by $3,239,804.

Lis Pendens

The defendants move for cancellation of the lis pendens filed on the subject property, pursuant to Minnesota Statutes, § 557.02, and *Melin v. Mott*, 4 N.W.2d 600 (Minn. 1942). Section 557.02 provides, in pertinent part, that:

> In all actions in which the title to, or any interest in or lien upon, real property is involved or affected, . . . any party thereto, at the time of filing the complaint, or at any time thereafter during the pendency may file for record with the county recorder . . . a notice of the pendency of the action . . . .

Minn. Stat. § 557.02 (1988). The Court is mindful of the general rule that an appeal continues the lis pendens

until final judgment is entered on appeal. *See Aldrich v. Chase*, 73 N.W. 161, 162 (1897). It is clear that the plaintiff has abandoned its claim for specific performance. The lis pendens is, therefore, no longer necessary to preserve the plaintiff's remedies, it simply hangs like a Damoclean sword over the heads of innocent third parties. This is neither the function of a lis pendens nor the purpose of section 557.02.

Defendants' motion to cancel the lis pendens on the subject property is granted.

Attorneys' Fees

Plaintiff's motion for attorneys' fees is hereby referred to the Honorable Franklin L. Noel, United States Magistrate Judge, for report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and (3), and Local Rule 72.1(f). The magistrate is directed to issue an order setting an appropriate schedule for the submission and consideration of the motion, pursuant to Local Rule 54.3(b).

Remittitur

Finally, the defendants move for remittitur. The review of a jury award by a federal district court is a question of federal law. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 488 U.S. 980 (1989). This Court recognizes that remittitur is only to be granted when a jury's verdict is so grossly excessive as to shock the conscience of the court. *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1993); *Ouachita Nat'l Bank v. Tosco Corp.*, 716 F.2d 485, 488 (8th Cir. 1983). The Court is "guided by the law of the forum state in weighing the excessiveness of the verdict." *American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1146 (8th Cir. 1986). Minnesota's law on the issue of lost profits damages is delineated above. With all of these

factors in mind, the Court finds that remittitur is appropriate here.

Real estate development, by its very nature, involves entrepreneurial enterprise and market risk. On the evidence presented, the jury could, and did, find that the defendants' actions constituted a breach of the development contract. The jury further found that defendants' actions injured LSGI's reputation in the market-place. The Court has concluded that the jury's verdict was not based upon speculation or conjecture.

This Court, however, is not blind to the enormous sum awarded. This is a liability which will ultimately fall upon the community's individual citizens and taxpayers. Unlike a private action between individual parties, the burden will fall not on the official wrongdoers, but on a populace which was only tangentially involved in the decision-making processes. A per capita tax of $85, even for wrongful acts of elected officials, shocks the conscience of the Court.

The Court deems it appropriate to reduce the contract and due process awards by approximately 45%. The Court directs a remittitur of the remaining damages award of $31,079,935, to $17,280,000.

Based on the files, records, and proceedings herein, and for the reasons set forth above, IT IS ORDERED that:

1. Defendants' motion for judgment as a matter of law is denied.

2. Defendants' motion for a new trial is denied.

3. Defendants' motion for cancellation of the Notice of Lis Pendens is granted.

4. The jury's award of out-of-pocket expenses is vacated, and the judgment shall be reduced by $3,239,804.

5. Plaintiff's motion for attorneys' fees is referred to the magistrate for report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B).

6. Defendants' motion for remittitur is granted. The damages award of $31,079,935 shall be reduced by approximately 45% to $17,280,000.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 21, 1993

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

APPENDIX D

[Filed July 19, 1990]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. 3-89-372

LA SOCIETE GENERALE IMMOBILIERE,
a French corporation, and LSGI, INC.,
a Delaware corporation,
Plaintiffs,

vs.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY, and THE CITY OF MINNEAPOLIS,
Defendants.

MEMORANDUM AND ORDER

INTRODUCTION

This is a diversity action alleging a 1983 violation, breach of contract and tortious interference with contract arising out of the termination of a contract entered into between the parties to redevelop Nicollet Mall. Plaintiffs move for summary judgment as to liability, and defendants move for summary judgment as to each count of plaintiffs' Amended Complaint and for partial summary judgment as to liability on defendants' counterclaim. For the reasons below, all motions are denied.

BACKGROUND

Plaintiffs include La Societe Generale Immobiliere, a French corporation, and its American affiliate, LSGI, Inc., a Delaware corporation. Defendants include the Minneapolis Community Development Agency (MCDA) and the City of Minneapolis (City).

In the summer of 1985 the Minneapolis City Council granted plaintiffs exclusive negotiation rights to develop a retail shopping center on Nicollet Mall to compete with the proposed Bloomington "Mega-Mall." On February 14, 1986, the Minneapolis City Counsel passed a resolution approving certain design components of the proposed development. The resolution included language incorporating a glass atrium (or dome) over Nicollet Mall and a tunnel for bus travel underneath.[1]

On November 3, 1986, plaintiffs and defendant MCDA executed a Contract For Private Development Of Land In Minneapolis, Minnesota (Development Contract). The Development Contract required plaintiffs to procure commitments from two major anchor tenants such as Bloomingdale's, Neiman-Marcus, Saks Fifth Avenue or Nordstroms within one year.

Section 2.01 of the Development Contract states that "the MCDA acknowledges that it has received and approved those elements of the preliminary Plans attached hereto as Exhibit [E]." Those plans called for a dome and tunnel. Section 2.02 of the Development Contract states that plaintiffs agree to modify the design to ". . . comply with any and all design guidelines or any and all other requirements related to the treatment of Nicollet

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[1] The February 14, 1986, resolution provides:

1. The primary transit alternative is a tunnel under the Project between 9th and 11th Streets.

2. Covering the Mall is an acceptable design alternative if the project is stepped back and the tunnel runs only beneath it as outlined in Option 2 (Petn. No. 237590).

Mall adopted by the Minneapolis City Counsel prior to the final approval by the MCDA of the proposed Project Plans and Specifications; . . ."

Over the next year, two department stores contacted plaintiffs. On October 12, 1987, Nordstroms signed a letter wherein it acknowledged approval of a fairly detailed business proposal drafted by LSGI. Two days later, on October 14, 1987, Neiman-Marcus issued a letter expressing conditional interest in leasing space for one of its stores, pending its own independent market research and site visit.

On November 3, 1987, plaintiffs and defendant MCDA executed and closed the Development Contract. At the closing, the parties executed a "Post-Closing Agreement" to the Development Contract wherein plaintiffs agreed to secure within 30 days "further evidence reasonably satisfactory to the MCDA that the Developer has secured an additional department store besides Nordstrom, Inc. and a grocery store, as Anchor Tenants for the Project." [Post-Closing Schedule ¶ 1].

Later that same day defendant MCDA adopted a resolution, referred to as the "Cramer Resolution" after its author, directing "the City Planning Director, working in consultation with the Nicollet Mall Implementation staff, John Burg, the MCDA, and LSGI, . . . to develop design guidelines pursuant to Article II, Section 2.02 of the contract between MCDA and LSGI within 30 days which maintain the Nicollet Mall as an open, urban street with no enclosure and at-grade transportation."

In response to local newspaper articles suggesting that Nordstroms and Neiman-Marcus were surprised by the Cramer Resolution, Mayor Fraser sent separate letters to Nordstroms on November 5, 1987 and Neiman-Marcus on November 16, 1987. The letters reaffirmed the City's interest in the project and explained the process by which the City decided against doming or tunneling Nicollet Mall.

On November 18, 1987, the 614 Company sued the MCDA in state district court (614 Litigation) alleging a temporary taking of its property. Plaintiffs advised defendant City on January 28, 1988 that the 614 Litigation constituted an "unavoidable delay" as defined in the Development Contract. On July 13, 1988, plaintiffs and defendant MCDA reached an agreement, summarized in a report by Executive Director James Heltzer (the Heltzer Report), to exclude the 614 Company's property from the Project, to maintain the streets at-grade and require only one anchor tenant subject to Nordstroms' approval. The Heltzer Report was never officially executed between the parties.

On January 20, 1988, defendant MCDA issued a Notice of Default alleging that plaintiffs had failed to provide commitments of two anchor tenants. Later, on March 18, 1988, defendant MCDA granted plaintiffs an extension until April 8, 1988 to secure a second anchor tenant. Not satisfied that plaintiffs had secured a second anchor tenant, the MCDA terminated the Development Contract on June 1, 1989.

Plaintiffs subsequently filed suit in federal district court claiming violation of civil rights pursuant to 42 U.S.C. § 1983 (count 1), breach of contract (count 2), injunctive relief (count 3), tortious interference with contract (count 4), tortious interference with prospective contract (count 5), declaratory relief (count 6), declaratory relief (count 7), and specific performance (count 8). Defendants counterclaimed for breach of contract and breach of lease. Plaintiffs now move for summary judgment as to liability. In turn, defendants move for summary judgment as to each count of plaintiffs' Amended Complaint, and for partial summary judgment as to liability on defendants' counterclaim.

DISCUSSION

A. *Summary Judgment*

Summary judgment is appropriate only where there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). While summary judgment is not to be regarded as a disfavored procedural shortcut, it remains an extreme remedy. Summary judgment may only be entered "against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When reviewing the record on summary judgment, the court must view the facts in light most favorable to that party which is opposing the motion. *See Loudermill v. Dow Chemical Co.*, 863 F.2d 566, 571 (8th Cir. 1988).

B. *42 U.S.C. § 1983 Claim*

Plaintiffs' first cause of action in its Amended Complaint against the municipal defendants is based on 42 U.S.C. § 1983. Plaintiffs allege deprivation of property without due process of law. Defendants contend that a commercial contract with a municipality does not give rise to a constitutionally protected property interest, and that plaintiffs received the requisite due process.

To recover under section 1983, plaintiff must establish deprivation of a constitutionally protected right. Property rights are not created by the constitution, but from independent sources such as state law, which provide plaintiff with a legitimate claim of entitlement and not simply an expectation of property. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Here, it is a question of fact and law whether plaintiffs received a legitimate entitlement when entering into the Development Contract. It is a question of fact whether plaintiffs held

conditional or complete property rights on the issue of the design treatment of Nicollet Mall.

With respect to plaintiffs' claim that it possesses a liberty interest, it is unclear whether the defendants embarrassed or stigmatized plaintiffs or whether the Mayor impugned plaintiffs' integrity in any way. Thus, the existence of a protected property and liberty interest necessarily depends on the resolution of material fact issues, and summary judgment should not be granted to either party as to plaintiffs' 1983 claim.

C. *Tort Claims*

Minnesota recognizes causes of action for wrongful interference with both present and prospective contractual relations. *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632 (Minn. 1982). Count four of plaintiffs' Amended Complaint alleges that defendants tortiously interfered with plaintiff's present contracts with the MCDA, Nordstrom's, Neiman-Marcus and unidentified retailers. To succeed on this count, plaintiffs must prove 1) the existence of a contract, 2) the defendants' knowledge of the contracts, 3) the defendants' intentional procurement of the breach of the contracts, 4) without justification, and 5) damages resulted therefrom. *Royal Realty Co. v. Levin*, 69 N.W.2d 667, 671 (Minn. 1955).

Plaintiffs clearly have no claim that the defendants tortiously interfered with plaintiffs' contracts with defendant MCDA, since a party to a lawsuit cannot interfere with its own contract. *See Wild v. Rarig*, 234 N.W.2d 775, 791 (Minn. 1979). Factual issues do remain, however, as to whether Nordstroms or Neiman-Marcus actually entered into enforceable contracts with plaintiffs. There are also questions of fact whether Mayor Fraser intended to interfere with the alleged contracts when he contacted Nordstroms and Neiman-Marcus by letter in November, 1987.

Count five of plaintiffs' Amended Complaint alleges that defendants interfered with plaintiffs' prospective contracts with Nordstroms, Neiman-Marcus and others. The Minnesota Supreme Court in *United Wild Rice, Inc. v. Nelson,* 313 N.W.2d 628 (Minn. 1982), adopting and quoting from the Restatement (Second) of Torts § 766B (1979), held that

> One who intentionally and improperly interferes with another's prospective contractual relation, . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relations, whether the interference consists of (a) inducing . . . the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Nelson, 313 N.W.2d at 632-33. Regardless whether this court finds the existence of a contract (since a contract is not required as an element to a claim for prospective interference), there is a factual dispute as to whether Nordstroms and Neiman-Marcus were prospective parties to contracts with plaintiffs.

Defendants move for summary judgment as to plaintiffs' tort claims based on tort immunity under Minnesota Statutes Section 466.03, subd. 6. Municipalities are immune from liability for claims based on

> the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

Minn. Stat. § 466.03, subd. 6. Acts can be either discretionary and immune or ministerial and not immune. Previously, the test applied was whether the act was a planning or merely an operational decision. *See Berg v. City of St. Paul,* 414 N.W.2d 204, 206 (Minn.App. 1987). The Minnesota Supreme Court recently narrowed the test in *Chabot v. City of Saulk Rapids,* 422 N.W.2d 708 (Minn. 1988)

> [C]ertain government conduct is protected under the discretionary function exception not simply because it is identified as a planning decision. Rather, it is immune because the specific function involves policy-making that can be made only by the legislative or executive branch of government. *Where the policy-making involves a balancing of social, political, or economic considerations, the conduct is immune as a discretionary function.*

Id. at 710-11 (emphasis added).

Mayor Fraser's November, 1987 letters to Nordstrom and Neiman-Marcus are the only tortious acts alleged by plaintiffs. The court finds that it is a question of fact whether these letters constitute discretionary or ministerial actions on the part of the Mayor. Accordingly, summary judgment should not be granted to either party as to plaintiffs' tort claims.

D. *Breach of Contract Claim*

1. Cramer Resolution

In count two of its amended complaint, plaintiffs allege that the November 3, 1987 Cramer Resolution adopted by defendant MCDA constituted a breach of contract. Plaintiffs contend that defendant MCDA rejected the preliminary plans referred to in Section 2.01 of the Development Contract [2] when it passed the Cramer Resolution, which called for the development of design guidelines to "maintain the Nicollet Mall as an open, urban street with no enclosure and at-grade transportation." Defendants counter that when the Cramer Resolution was passed the MCDA was merely exercising its rights under Section 2.02 of the Development Contract, which reserved

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[2] In Section 2.01 the MCDA acknowledged that it "received and approved those elements of the Preliminary Plans attached hereto as Exhibit [E]." Those plans called for a dome over the project and a tunnel for bus transportation under it.

to the Minneapolis City Counsel the right to approve or reject the dome and tunnel. Clearly, a fact issue exists as to whether Section 2.02, which vests in the *Minneapolis City Counsel* the right of "final design approval of the project's treatment of the Nicollet Mall," applies equally to the *MCDA* which passed the Cramer Resolution.

2. Implied Covenant of Good Faith and Fair Dealing

In count two plaintiffs also contend that the defendants breached an implied covenant of good faith and fair dealing when Mayor Fraser contacted Neiman-Marcus on November 16, 1987. The letter reaffirms defendant City's interest in the project and explains the process by which the City decided against doming or tunneling Nicollet Mall. While Mayor Fraser was arguably opposed to plaintiffs' plan to dome and tunnel Nicollet Mall, there is a factual issue as to whether the Mayor cooperated or interfered when he wrote the letters to Nordstroms and Neiman-Marcus.

3. Anchor Tenants

The defendants claim that they terminated their contract with plaintiffs when the developer failed to secure two anchor tenants for the project as required. This is the basis of defendants' counterclaim for breach of contract. It is clearly a question of fact whether plaintiffs satisfactorily produced the requisite anchor tenants based on the letters received from Nordstroms (October 12, 1987) and Neiman-Marcus (October 14, 1987).

4. Unavoidable Delay

In count seven of its amended complaint, plaintiffs request a declaratory judgment that defendants breached the Development Contract by terminating it while there existed an "unavoidable delay." Unavoidable delays are defined in the Development Contract as

> Acts of God, casualties, war . . . litigation commenced by third parties (including litigation objecting to the taking of portions of the property or otherwise interfering with the ability of the developer or the MCDA to act, but excluding litigation as to the value of the property taken in condemnation) . . .

When an unavoidable delay occurs, Section 17.08 of the Development Contract provides that the time for any party to perform "shall be extended for the period of such Unavoidable Delay."

Plaintiffs argue that the 614 Litigation interfered with its ability to attract anchor tenants and constitutes an "unavoidable delay" as defined by the Development Contract. Therefore, they argue, their obligation to procure two anchor tenants should have been suspended from November 18, 1987. Defendants, citing the deposition testimony of Robert Smith of Neiman-Marcus and Bruce Nordstrom of Nordstroms, argue that plaintiffs' filing of the 614 lawsuit did not constitute an unavoidable delay and did not interfere with plaintiffs' ability to secure anchor tenants as required by the Development Contract. Clearly, there is factual dispute here.

In addition, defendants argue that plaintiffs failed to give the MCDA written notice of unavoidable delay within 30 days of its occurrence as required by Section 17.08 of the Development Contract. The lawsuit was commenced on November 18, 1987, but the first written assertion of unavoidable delay did not occur until January 18, 1988. Plaintiffs do not dispute that they gave tardy notice. Under Minnesota law, however, a notice provision in a contract will not be enforced unless the party who is to receive notice can prove prejudice. *See St. Paul Fire & Marine Ins. Co. v. Wabash Fire. & Cas. Ins. Co.*, 264 F.Supp. 637 (D. Minn. 1967); *Reliance Insurance Company v. St. Paul Insurance Companies*, 239 N.W.2d 922 (Minn. 1986). Here, it is highly unlikely that defendants were prejudiced by plaintiffs' delay.

Accordingly, summary judgment in favor of either party should be denied as to plaintiffs' contract claims.

E. *Certificate of Authority*

Defendants further contend that plaintiffs' contract and tort claims should be dismissed for plaintiffs' failure to file the requisite certificates of authority with the State of Minnesota. Under Minnesota Statute § 303.20

> No foreign corporation *transacting business* in this state without a certificate of authority shall be permitted to maintain an action in any court in this state until such corporation shall have obtained a certificate of authority . . . .

Minn. Stat. § 303.20 (emphasis added). *See also McAninch v. Traders Nat. Bank of Kansas City*, 779 F.2d 466, 467 n.2 (8th Cir. 1985) (foreign corporation doing business in Missouri without obtaining a certificate of authority lacked capacity to sue).

Since plaintiffs admit to never filing a certificate of authority with the State of Minnesota, the sole question is whether plaintiffs were "transacting business" within Minnesota. The extent of plaintiffs' business in Minnesota was that it entered into a Development Contract, Lease and Post-Closing Agreement with defendant MCDA. Such a one-time transaction does not constitute "transacting business" by any court's definition. *See Cohn-Hall-Marr Co. v. Feinberg*, 214 Minn. 584, 8 N.W.2d 825 (1943); *E.C. Vogt, Inc. v. Ganley Bros. Co.*, 185 Minn. 442, 242 N.W. 338 (1932); *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N.W. 616 (1904).

Conclusion

Based upon the files, records and proceedings herein, and upon all the briefs of counsel,

IT IS ORDERED That

1. Plaintiffs' motion for summary judgment as to liability is DENIED.

2. Defendants' motion for summary judgment as to each count of plaintiffs' Amended Complaint is DENIED.

3. Defendants' motion for partial summary judgment as to liability on defendants' counterclaim is DENIED.

Dated: July 16, 1990

/s/ Edward J. Devitt
EDWARD J. DEVITT
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-292OMNMI, 93-3123MNMI

LA SOCIETE GENERALE IMMOBILIERE,
a French corporation, and LSGI, INC.,
a Delaware corporation,
Appellees/Cross-Appellants,

vs.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY, and THE CITY OF MINNEAPOLIS,
Appellants/Cross-Appellees.

Appeal from the United States District Court
for the District of Minnesota

MOTION FOR LEAVE TO FILE
POST-ARGUMENT MEMORANDUM

Appellees/Cross-Appellants La Societe Generale Immobiliere and LSGI, Inc. (collectively "LSGI") respectfully requests leave to file the attached Post-Argument Memorandum of Appellees/Cross-Appellants. This submission responds to an erroneous statement made by counsel for Appellants during rebuttal, to which counsel for LSGI had no opportunity to respond.

Respectfully submitted,

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May 12, 1994

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-292OMNMI, 93-3123MNMI

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POST-ARGUMENT MEMORANDUM OF APPELLEES/CROSS-APPELLANTS

During the rebuttal portion of his oral argument yesterday, this Court asked counsel for Appellants to describe the effect of a possible ruling that Judges Devitt and Rosenbaum erred in not holding that the Development Contract unambiguously granted the MCDA the right, at any time during the contract year, to alter LSGI's plans for the development of Nicollet Mall. Appellants' counsel replied that in that event the judgment must be reversed. That contention, to which LSGI had no opportunity to respond, is not legally correct. LSGI files this post-argument memorandum to correct this error.

LSGI argued at trial that Appellants breached the Development Contract by preventing it from performing its obligations under the Contract, and this was the sole theory of liability submitted to the jury. *See* Brief of Appellees/Cross-Appellants at 20 (discussing Instruction No. 22). LSGI identified numerous actions taken by the City that prevented it from performing. It introduced substantial evidence, for example, that its performance was blocked by the Cramer Resolution in November, 1987. It also introduced substantial evidence that its performance was blocked by a number of actions taken by the City during the 18 months *following* the Cramer Resolution, including, *inter alia*, (1) the Mayor's oral and written statements concerning LSGI's veracity, *id.* at 10-11, 30-33; (2) the City's bad faith financial inducement to Neiman-Marcus to locate at another site, *id.* at 11-12; (3) the City's bad faith issuance of a notice of default on the same day that it approved LSGI's revised plans, *id.* at 12; and (4) the City's decision to terminate during a period of contractual "Unavoidable Delay," *id.* at 34.

The jury, on the basis of a verdict form to which Appellants did not object, *see* Post-Trial Order at 7, n.3, returned a *general* verdict in favor of LSGI on the sole theory of breach on which it was instructed—that the City prevented LSGI from performing. Because it returned a general verdict, the jury's finding of breach by the City must be affirmed if there is sufficient evidence that any *one* of the City's actions prevented LSGI from performing.

Whether the Development Contract unambiguously granted the MDCA the right, at any time during the contract year, to alter the project plans relates only to the issue of whether the Cramer Resolution—one of many adverse actions taken by the City—constituted a breach. It does not relate to whether the City's *other* bad faith actions in the subsequent 18 months *also* prevented LSGI from performing. Because the evidence that

the City's other actions prevented LSGI from performing was sufficient to support the verdict, the judgment below must be affirmed even if this Court determines that the Contract is not ambiguous.

Respectfully submitted,

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May 12, 1994